United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1109

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1109

UNITED STATES OF AMERICA,
Appellee,

—v.—

ADOLPHO RIVERA, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

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Docket No. 75-1109

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—v.—

ADOLPHO RIVERA, JR.,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Adolpho Rivera, Jr., appeals from a judgment of conviction entered on March 7, 1975, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 75 Cr. 44, filed January 16, 1975,* charged Adolpho Rivera, the appellant, and Rafael Fontanez in Count One with conspiracy to murder Jerry Castillo, a Special Agent of the Drug Enforcement Administration, in violation of Title 18, United States Code, Sections 1117, 1114 and 1111. Count Two charged Rivera and Fontanez with assaulting Castillo with intent to rob him of $14,000

* Indictment 75 Cr. 44 superseded Indictment 74 Cr. 1013 filed October 29, 1974.

of money belonging to the United States in violation of Title 18, United States Code, Section 2114 and Section 2. Count Three charged both defendants with putting Castillo's life in danger with a thirty-eight caliber revolver in attempting to effect the robbery charged in Count Two in violation to Title 18, United States Code, Section 2114 and Section 2. Count Four charged Rivera and Fontanez with assault on a federal officer and employee in violation of Title 18, United States Code, Sections 111, 1114 and Section 2. Count Five charged both defendants with the use of a deadly and dangerous weapon in the commission of the assault charged in Count Four. Count Six charged the defendant with unlawfully carrying a firearm during the commission of and with using a firearm to commit the felony charged in Count One in violation of Title 18, United States Code, Section 924(c)(1) and (2).*

On January 27, 1975, the co-defendant Rafael Fontanez was found incompetent to stand trial and was thereafter committed to the custody of the Attorney General for observation and examination pursuant to Title 18, United States Code, Section 4246. Trial proceeded against Rivera. On January 28, 1975, after the government rested, Judge Wyatt dismissed the first count of the indictment charging a conspiracy to murder a federal officer and employee on the ground that the government has not proven that the defendants knew that the person they conspired to murder was a federal officer or employee, relying on this Court's decision in *United States* v. *Alsondo*, 486 F.2d 1339 (2d Cir. 1973), which was reversed two months later as *United States* v. *Feola*, — U.S. —, 43 U.S.L.W. 4404 (March 19, 1975). Judge Wyatt also dismissed Count Six of the indictment, which was predicated on Count One.

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* Fontanez was also charged with the possession of a firearm while under indictment in violation of Title 18, United States Code, Section 922(h)(1).

On January 28, 1975, the jury found Rivera guilty on the remaining Counts Two, Three, Four and Five of the indictment.

On March 7, 1975, Judge Wyatt sentenced Rivera on Counts Three and Five only, holding that Counts Two and Four represented lesser included offenses of the crimes charged in Counts Three and Five. He sentenced Rivera on Count Three to a term of imprisonment of twenty-five years and directed that fifteen years of such sentence be served in a jail-type institution with the remainder suspended and that the defendant be placed on probation for a period of one day. On Count Five Judge Wyatt sentenced Rivera to ten years imprisonment to run concurrently with the sentence imposed on Count Three. Rivera has been incarcerated since his arrest.

Statement of Facts

The Government's Case

On the evening of October 17, 1974, Jerry Castillo and Cruz Codero, two undercover agents of the Drug Enforcement Administration, were introduced to Rafael Fontanez inside the Chateau Bar, on Irving Street in Brooklyn (Tr. 10-11)* Codero told Fontanez, who was using the name "Lefty", that he and Castillo were interested in purchasing one kilogram of heroin (Tr. 11). Fontanez said there would be no problem in obtaining the heroin, but that it would take approximately an hour and a half to obtain the narcotics from the Pelham Bay area of the Bronx (Tr. 11). Codero told Fontanez he could not wait that long. After Fontanez offered also to supply cocaine, he and Codero exchanged telephone numbers so that the heroin purchase could be arranged for the next day (Tr. 11-13).

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* "Tr." refers to the trial transcript.

The following day, Codero had several telephone conversations with Fontanez (Tr. 13-14). Finally, at about 6:30 P.M., Castillo took $14,000.00 in cash supplied by the Drug Enforcement Administration, placed it in the trunk of his car and drove to the area of 163rd Street and the Grand Concourse in the Bronx (Tr. 14). There, he met Fontanez. Castillo then drove Fontanez to a grocery store a few blocks away so that Fontanez could make a telephone call (Tr. 17). After making the call, Fontanez returned to Castillo's car and told him, "Okay. Everything is ready. I want to see the money." Castillo agreed, but before opening the trunk he asked Fontanez if he was carrying a gun (Tr. 17). Fontanez then raised his shirt and turned around so that Castillo could observe that he had no weapon (Tr. 18). Castillo opened the trunk and displayed the $14,000, which was in hundred dollar bills in a brown paper bag in the trunk (Tr. 18). Fontanez insisted upon driving the car because he knew where to go. He drove Castillo on a wild ride through the Bronx during which Fontanez made illegal U-turns, ran stop signs and lights, and drove at speeds up to 70 miles per hour, always checking the rear view mirror as he went to see if anyone was following him (Tr. 18).

Ultimately, Fontanez drove Castillo to 196th Street and Colonial Avenue in the Bronx, where he parked the car, took the keys from the ignition and started walking away. Castillo told Fontanez to leave the keys, but Fontanez insisted that he needed the keys because "I have to show my connection or source that I have the keys for the car which contains the money in the trunk." Fontanez continued, "This is the only way the package will be fronted to me" (Tr. 20). Castillo continued to protest, and Fontanez relented, stating "I will leave the keys in the car, but don't go anywhere. I will be right back" (Tr. 20). Castillo then moved to the driver's side of the car.

In about five minutes, Castillo saw Fontanez and the appellant Adolpho Rivera, Jr., walking toward the car (Tr.

20). Fontanez approached the driver's side of the car carrying a plain brown paper bag, which in fact contained a pound of coffee, and Rivera remained at the back of the car (Tr. 21). Fontanez approached the car window, which was half open, and told Castillo, "Okay, I got the stuff. Let me show it to you. It's good." As soon as Castillo opened the door, Fontanez pointed a fully loaded .38 caliber revolver at Castillo and said, "Okay, move over and let my man in the back seat," referring to Rivera (Tr. 21, 73-74). Rivera then opened the car door on the passenger's side and got in the back seat. As soon as Rivera got into the car, Fontanez took the car keys from the ignition and told Castillo he was going to kill him (Tr. 22). Castillo pleaded with Fontanez not to kill him. He told Fontanez that he could have the money but begged not to be killed (Tr. 22, 65). Fontanez then instructed Castillo to put his hands behind his back (Tr. 22). Castillo placed his hands behind the car seat, which was broken and tilted at an angle leaning into the back seat. Rivera, without awaiting instructions from Fontanez (Tr. 71), grabbed Castillo's wrists and held Castillo's hands behind his back while Fontanez continued to point the loaded .38 caliber revolver at Castillo (Tr. 22-23). Fontanez then asked Rivera if he should kill Castillo right there (Tr. 23). Fontanez told Rivera to handcuff Castillo, saying he would drive Castillo elsewhere to shoot him (Tr. 23). On Fontanez' instructions to handcuff Castillo, Rivera let go of Castillo's hands for a few seconds (Tr. 23).

When Fontanez had first entered the car pointing the gun, Castillo flipped off a white hat which he had been wearing (Tr. 22). This was a prearranged signal to the surveillance team of other agents which was covering Castillo, and, as Rivera was preparing to handcuff Castillo, the surveillance team surrounded the car with their guns drawn and pointed them at Fontanez and Rivera (Tr. 23).

With his hands temporarily freed, Castillo quickly unlocked the door and rolled out of the car onto the street (Tr. 23).

Special Agent O'Connor saw Fontanez throw his gun under the driver's seat. He and Special Agent Moran then pulled Rivera from the back seat over the front passenger seat (Tr. 84-85). They put Rivera up against the wall; Rivera began to struggle (Tr. 85). The agents then spread-eagled Rivera on the ground and found a pair of Spanish-made handcuffs in the small of Rivera's back with one cuff hanging over the back of his pants (Tr. 85; GX 3).

The Defense Case

Rivera, testifying in his own behalf, said that on the evening of October 17, 1974, he was visiting a friend, Jose Net, at 2135 Colonial Avenue, in the Bronx (Tr. 145). After a while, Fontanez came to the house, and this was the first time that Rivera had ever seen him (Tr. 145-146). Rivera asked Fontanez if he would give him a lift home (Tr. 147). Fontanez agreed and Rivera left the house with Fontanez and accompanied him to his car (Tr. 147). At the car, Fontanez told Rivera to get in, which he did (Tr. 148, 149). As Rivera sat there, Fontanez pointed something at Castillo and directed Rivera to hold Castillo's hands, and, according to Rivera, ". . . I got scared and I held his wrists" (Tr. 149). Fontanez then asked Rivera, "Shall I kill him?" and Rivera responded, "No." (Tr. 149). Rivera further testified that he had never possessed the handcuffs the agents testified they had recovered from him and that he never seen the gun prior to Rivera's pulling it on Castillo in the car (Tr. 146, 151).

ARGUMENT

Rivera's convictions on Counts Two and Three should be affirmed and Count Three remanded for resentencing. His convictions on Counts Four and Five should be affirmed.

Rivera claims that his convictions on Counts Two and Three are invalid* because there was no nexus between his offense and the Postal Service. The recent decisions of this Court concerning Section 2114 compel us to agree. *United States* v. *Rivera*, Dkt. No. 74-2115 (2d Cir., March 13, 1975); *United States* v. *Reid*, Dkt. No. 74-2598 (2d Cir., April 24, 1975).**

The only question remaining is what the proper remedy is. Rivera agrees that under *United States* v. *Rivera, supra,* a remand for resentencing under Section 2112 may be appropriate in some cases (Brief at 11). However, he contends that here such a remedy is inappropriate on the ground that the Government's proof was inadequate "to show appellant's knowledge of or participation in Fontanez' arrangement for a sale of narcotics to Drug Enforcement

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* Rivera's claims on appeal are directed solely to his convictions on Counts Two and Three, which are laid under Section 2114 of Title 18, United States Code. No attack is made on the convictions on Counts Four and Five, which were charged under Section 111 of Title 18, United States Code. Whatever the outcome on Counts Two and Three, the convictions on Counts Four and Five should not be disturbed.

** The United States Attorney's Office for the Southern District of New York continues to be of the view that Judge Mansfield's opinion, dissenting in part, in *Reid* expresses what ought to be the proper construction of Section 2114. Since, however, the panel in *Rivera*, a majority of the panel in *Reid*, and the Solicitor General of the United States do not agree, it seems far too late in the day to argue that the offenses charged were properly laid under Section 2114.

Administration agent Castillo on October 18, 1974. This is so because, on the facts of this case, the only way a robbery could have been part of the scheme was either as a sale of bogus drugs or a taking of the money to be used to pay for the drugs" (Brief at 12). This argument is entirely specious. The only proof necessary was that Rivera assisted Fontanez in committing a robbery of Agent Castillo with the intent to participate in the robbery. See *United States* v. *Gallishaw*, 428 F.2d 760 (2d Cir. 1970).

Here the Government's proof established that Fontanez was planning to "rip off" Agent Castillo. While there was no direct proof that Rivera knew the details of the scheme, there was ample circumstantial evidence on this point. The trip to the site of the "rip off" occurred only after Fontanez had made a telephone call and returned saying everything was ready. Moreover, when Rivera and Fontanez returned to Castillo's car after Fontanez had gone off to see his "connection" and get the "package", Fontanez was carrying a pistol he had apparently not had earlier and Rivera was carrying handcuffs. But the "package" was coffee and not narcotics, and both Rivera and Fontanez were carrying devices designed to restrain a person temporarily or permanently. All of this was strong evidence that Rivera was then a knowing participant in an impending robbery which had been planned and was to be executed by both of them. Further proof that the robbery of Castillo was a joint venture between Rivera and Fontanez in which Rivera played a prominent, indeed superior, role, is the fact that once both were in the car with Castillo at gunpoint, Fontanez, who repeatedly referred to Rivera as his "man", asked Rivera whether he should shoot Castillo on the spot. *See United States* v. *Rivera, supra,* slip op. at 2279-2283.

Even assuming, however, that Rivera carried handcuffs as a matter of routine and had no knowledge of or intent to participate in a "rip off" of Agent Castillo as he ap-

proached Castillo's car, the fact remains that since Rivera only entered the car after Fontanez had ordered Castillo at gunpoint to let Rivera in, Rivera had to know that considerable mischief beyond hitchhiking was afoot and clearly intended to participate in it. Of course, the Government had to prove more than that to convict on Counts Two and Three—it was necessary to establish that Rivera knew of and intended to participate in a robbery. E.g. *United States* v. *Gallishaw*, *supra*. That Rivera knew that the manhandling of Agent Castillo was directed not only to killing him but also to robbing him was established, if by nothing else, by the fact that, according to Castillo's testimony, *before* Rivera pinioned and attempted to handcuff Castillo's hands behind his back (Tr. 22):

> "A. Mr. Rivera got into the back seat. Mr. Fontanez took the key from the ignition and told me at that point that he was going to shoot me or kill me.
>
> Q. He had the gun——
>
> A. Pointed right at me, a few inches away from my face.
>
> Q. And then what happened?
>
> A. At that point I begged him not to shoot me, kill me, and I said, 'You can take the money, or anything . . .'" (Tr. 65).*

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* Rivera makes the further argument in his brief, relying primarily on *United States* v. *Dickerson*, 508 F.2d 1216 (2d Cir. 1975) that Judge Wyatt's aiding and abetting charge improperly permitted the jury to convict of aiding and abetting on Counts Two and Three on a finding of intent to participate either in an assault or a murder or a robbery. This was error, Rivera contends, because only if he had the intent to participate in a robbery could he be convicted of aiding and abetting on Counts Two and Three. His claim is without merit.

Judge Wyatt first explained to the jury the elements of each offense charged, making clear that he would define aiding and abetting ". . . at one time . . . because that is a common element of all four of the counts submitted to the jury." (Tr. 190-192). Having defined the elements of each crime, and having told the jury that "[t]he Government must show only that Fontanez did the robbing or attempting to rob, the assaulting, the interference,

[Footnote continued on following page]

etcetera, that Fontanez carried a gun, and that Rivera aided and abetted Fontanez in those acts" (Tr. 199), Judge Wyatt proceeded to give the aiding and abetting instruction now challenged:

> "In order to find that the defendant Rivera aided and abetted Fontanez to commit the offenses charged in these four counts, you must find that the defendant Rivera in some way associated himself with the criminal venture; that he participated in it as something he wished to bring about; that he, by his act or acts endeavored to make it succeed.
>
> In determining this question you may consider whether the defendant Rivera had joined with Fontanez in a criminal venture, a plan, a partnership, to rob or to kill or to assault." (Tr. 200).

The Court's charge, taken as a whole, as it must be, *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974), was more than sufficient to convey to the jury the requisite intent needed for conviction on Counts Two and Three. *United States* v. *Howell*, 447 F.2d 1114, 1116-1118 (2d Cir. 1971). *Cf. United States* v. *Park*, — U.S. —, 43 U.S.L.W. 4687, 4692-4693 (June 9, 1975). The plain purport of the second of the quoted paragraphs of the aiding and abetting instruction, read in the context of the whole charge, was not, as Rivera claims, that *any* specified intent would do for conviction on Counts Two and Three; rather, it seems clear that the Judge meant, and the jury understood, that each of the various criminal intents discussed in that paragraph should be considered with the offense to which it was relevant, a view confirmed by the Judge's more extensive supplementary instruction on the point during the jury's deliberations (Tr. 214-216), and earlier portions of the main charge (Tr. 199). Moreover, even if the potential confusion Rivera claims could have been engendered by the second quoted paragraph, this case is quite different from *Dickerson*, for there the erroneous joint venture instruction was offered by the trial judge as an alternative to the aiding and abetting theory, while here the Judge merely said that in making its determination about aiding and abetting the jury "may consider" whether the defendants were involved in a joint venture to murder, rob or assault. *United States* v. *Gallishaw*, *supra*, on which Rivera also relies, is similarly distinguishable for the reasons given in *United States* v. *Howell*, *supra*, 447 F.2d at 1117-1118. Finally, both *Dickerson* and *Gallishaw* are distinguishable here because in those cases this Court found that timely objection had been taken below. Here, however, no objection of any sort was voiced by defense counsel either to the main charge or to the supplemental charge, and even giving full play to appellate counsel's exegesis of the imperfections of the second quoted paragraph, it hardly rises to the level of "plain error."

The serious issue with recasting Rivera's conviction on Counts Two and Three as a conviction for violation of Section 2112—an issue which Rivera has not raised—arises from the fact that the offenses charged in Counts Two and Three under Section 2114 were not robbery but rather were assault with intent to commit robbery. Similarly, the Judge charged the jury on Counts Two and Three that the necessary finding was one of assault with intent to commit robbery or of "the assault and the attempted robbery" (Tr. 191). In short, the issue here is that a conviction under Section 2112 requires proof of a completed robbery, while conviction for an offense under 2114, as here charged and submitted to the jury, has no such requirement. *Norton* v. *Zerbst*, 83 F.2d 677, 679 (10th Cir.), *cert. denied*, 299 U.S. 541 (1936).

While the Government conceded that a resentence under Section 2112 was inappropriate in *Rivera*,* that is not rele-

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* While it is by no means clear, a reading of Rivera's brief raises the possibility that he may not be aware that after the filing of the opinion in *United States* v. *Rivera, supra*, vacating the conviction for violation of Section 2114 and remanding for resentencing under Section 2112, the Government addressed a letter to the Court under date of March 28, 1975, suggesting that there was no proof of a completed robbery in the record and that resentencing under Section 2112 was not an appropriate remedy. On April 1, 1975, the Court filed an order modifying its opinion to take account of the Government's concession. For the convenience of the Court, the letter and the order of April 1 are printed following.

March 28, 1975

The Honorable J. Edward Lumbard,
The Honorable Henry J. Friendly,
The Honorable Murray I. Gurfein,
United States Circuit Judges
United States Courthouse
Foley Square
New York, New York 10007

RE: United States v. Rivera, Dkt. No. 74-2115 (2d Cir., March 13, 1975)

[Footnote continued on following page]

Your Honors:

In affirming Rivera's conviction on all three counts of indictment 74 Cr. 280, this Court vacated the sentence imposed on the second count, which charged a violation of Title 18, United States Code, Section 2114, and remanded for resentence on that count under Section 2112 of Title 18, United States Code, which makes it a crime to rob personal property of the United States. While such a remand for the purpose of resentencing is appropriate where a defendant has been erroneously charged and convicted under Section 2114 of having participated in a completed robbery of non-postal related property of the United States, as was the case in *United States* v. *Hanahan*, 442 F.2d 649 (7th Cir. 1971), that is not the situation here. In the second count of the indictment Rivera was charged with an assault occurring during an attempted robbery, and the evidence at trial established no more than that.

Since Section 2112 does not make it a crime to attempt to rob personal property of the United States, we respectfully submit that Rivera may not be resentenced under that section on the facts of this case. We believe that the conviction on the second count should be reversed and that charge dismissed.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: /s/ JOHN D. GORDAN, III
JOHN D. GORDAN, III
Assistant United States Attorney
Chief Appellate Attorney

ORDER
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Docket No. 74-2115

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of April, one thousand nine hundred and seventy-five.

Present: HON. J. EDWARD LUMBARD,
HON. HENRY J. FRIENDLY,
HON. MURRAY I. GURFEIN,
Circuit Judges.

[Footnote continued on following page]

UNITED STATES OF AMERICA,

Appellee,

v.

ISMAEL RIVERA, a/k/a "Pequilino",

Appellant.

The Government having commendably brought to our attention an error in our opinion which worked in its favor, it is ordered that said opinion be modified as follows:

On p. 2263 the last paragraph is modified to read: "Affirmed except that the conviction on the second count of the indictment is reversed and the cause remanded with instructions to dismiss that count."

On p. 2287 the entire text is deleted and the following text and additional footnote 21 are substituted:

> "The question remains as to the appropriate remedy for this error. Unlike in *Hanahan* where the offense for which the defendant was charged and convicted was in fact covered by 18 U.S.C. § 2112,[19] which does not require a postal nexus, neither that nor any other statute covers the situation here. Although Count II of the indictment charged an assault 'in effecting and attempting to effect' a robbery,[20] thereby leaving open the possibility of conviction under § 2112, the Government concedes that the evidence at trial was limited to showing that an assault was committed during an attempted robbery, which is all that is required under § 2114. The trial court's charge was similarly limited. The simple remedy available in *Hanahan* of remanding for sentencing under the correct statute is thus not available.[21] In these circumstances, where defendant has already been sentenced to life imprisonment for another offense, it would serve little purpose to remand for a full trial on the question of whether the attempted robbery was completed for purposes of sustaining a conviction under § 2112. The conviction as to Count II is reversed and the cause remanded with instructions to dismiss that count of the indictment. The convictions are affirmed as to Counts I and III.
>
> 21. It is settled law that citation of a wrong section of the penal code, not going to the substance of the crime charged, is not ground for dismissal of an indictment, at least where the defendant has not been misled to his prejudice. *See* Fed. R. Crim. P. 7(c);

[Footnote continued on following page]

vant here. In contrast to *Rivera*, here there is sufficient evidence to establish the crime of robbery under Section 2112. *Duffy* v. *Hudspeth*, 112 F.2d 559 (10th Cir. 1940). *Cf. Rutkowski* v. *United States*, 149 F.2d 481 (6th Cir. 1945). Here Fontanez had seen the "buy" money in the trunk of Castillo's car, was holding Castillo, the custodian of the car and the money, at gunpoint while Rivera pinioned Castillo's hands behind his back, had taken the keys to the car, and had wrung from Castillo the express relinquishment of any possessory interest in the money if only his life would be spared. This was a sufficient "taking" and assertion of possession and dominion of the keys, car and money to constitute a completed robbery within the meaning of Section 2112. *Duffy* v. *Hudspeth, supra; Rutkowski* v. *United States, supra;* LaFave and Scott, Criminal Law § 94 (1972); *United States* v. *Wolfenbarger*, 426 F.2d 992 (6th Cir. 1970); *cf. United States* v. *Pardo-Bolland*, 348 F.2d 316, 323-324 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965); *United States* v. *Gitlitz*, 368 F.2d 501, 505 (2d Cir. 1966), *cert. denied*, 386 U.S. 1038 (1967).

Here, of course, as in *Rivera*, the submission of the Section 2114 counts to the jury as assaults with intent to rob required no finding by the jury of a completed robbery,* and the absence of an instruction requiring such a finding was a factor given weight by this Court in its April 1 order modifying the *Rivera* opinion. However, as noted, the obstacles to recasting the Section 2114 conviction in *Rivera* went beyond the Court's instructions. We respectfully sub-

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United States v. *Cook*, 412 F.2d 293 (3 Cir.), *cert. denied*, 396 U.S. 969 (1969)."

/s/ J. EDWARD LUMBARD
Hon. J. Edward Lumbard
/s/ HENRY J. FRIENDLY
Hon. Henry J. Friendly
/s/ MURRAY I. GURFEIN
Hon. Murray I. Gurfein

* A completed robbery may, but need not, be charged under Section 2114.

mit that here the defect in the Court's charge is insufficient to preclude a remand for resentencing under Section 2112.

The Supreme Court has recently pointed out that ". . . in reviewing jury instructions, our task is also to view the charge as part of the whole trial." *United States* v. *Park*, *supra*, 43 U.S.L.W. at 4692. Here the issues at trial involved no dispute that Fontanez had committed the crimes charged in the indictment; rather, the defense was simply that Rivera had not aided and abetted Fontanez, lacking both knowledge of what Fontanez was about and intent to participate in it. This defense was rejected by the jury, which, under the instructions that were given, found by its verdict that Rivera had been a wilful and knowing participant in an assault on Agent Castillo with intent to rob him. Having clearly accepted so much of the Government's proof—primarily the testimony of Agent Castillo—as was necessary to make this finding under the District Court's instructions, it is inconceivable that the jury did not accept the minor and uncontested portions of Agent Castillo's testimony which establish factually that a completed robbery, and therefore a violation of Section 2112, occurred. *Cf. United States* v. *Honneus*, 508 F.2d 566, 571 (1st Cir. 1974). To be sure, there have been cases in which the omission of elements of the crime from the District Court's instructions has been held to be "plain error" requiring reversal, *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974), *United States* v. *Clark*, 475 F.2d 240 (2d Cir. 1973), and in *Howard* the Court expressly rejected the Government's argument that, since the elements of the offense not put to the jury were uncontested by the defendant, the error was harmless. However, in both *Howard* and *Clark* the distortions in and omissions from the charge were of far greater significance and far more aggravated than the distinction between an instruction on an assault with intent to rob instead of one on a completed robbery. Moreover, the "plain error" rule governing defective submissions to the jury on the elements of the crime ". . . is subject to an exception when the verdict gives assurance that no prejudice

in fact occurred [citations omitted]". *United States* v. *Reid, supra,* slip op. at 3096. To be sure, *Reid* and the cases the Court relied on there found the defects involved harmless because a guilty verdict on another count properly charged required a finding of the same facts necessary for the element elsewhere omitted or erroneously charged—a construction of the verdicts here which may be unavailable. However, as noted above, no reasonable analysis of the jury's verdicts in this case can support the view that the jury rejected those brief and uncontested portions of Castillo's testimony making out the completed robbery while accepting the bitterly contested portions of the testimony which supported the guilty verdicts returned and which themselves virtually establish a completed robbery.* *Cf. United States* v. *Jenkins,* 510 F.2d 495, 498 (2d Cir. 1975).**

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* Indeed the trial judge frequently referred in his instructions to the offenses charged in Counts Two and Three as robbery without any qualifying use of the word attempt (Tr. 189, 199, 216), defined robbery, not attempted robbery, in the course of his instructions (Tr. 192), and, twice, in charging on Count Three, referred to "the robbery charged in Count Two" (Tr. 195).

** No misplaced notion of lenity should support a reversal for a new trial for violation of Section 2112, particularly since the fortuitous circumstance that this trial occurred two months before the Supreme Court's opinion in *United States* v. *Feola, supra,* has permitted Rivera, through the District Court's dismissal of Count One on the authority of *United States* v. *Alsondo, supra,* after jeopardy had attached, to escape conviction for violation of Section 1117 of Title 18 and a potential penalty of imprisonment for life.

CONCLUSION

The judgment of conviction should be affirmed. The sentence on Count Three should be vacated and the cause remanded for resentencing on that count.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States Of America.

THOMAS M. FORTUIN,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—215—524

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of June, 1975 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square, New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas M. Fortuin

THOMAS M. FORTUIN

Sworn to before me this

17th day of June, 1975

Jeanette Ann Grayeb

NOTARY PUBLIC

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1341675
Qualified in Kings County
Commission Expires March 30, 1977